87-352 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

GERALD SAWATZKY*
JIM H. GOERING
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

EDWYN R. SHERWOOD
Sun Exploration and Production
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608
Attorneys for Petitioner

Date: August 28, 1987

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Do the Due Process Clause, and the Full Faith and Credit Clause of Article IV of the Constitution, require the forum state to apply the limitations law of the state where the claim arose and claimant resides? In this connection, should *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953), be overruled; or should *Wells'* broad dictum that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state" be circumscribed to apply only when the forum state's limitations statute is shorter than that of the state wherein the claim arose?

2. Under the holding in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that the Due Process Clause and the Full Faith and Credit Clause require the law of Texas and of other states to be applied to claims for interest arising in each of those states, in a Kansas multi-state class action, (a) must the limitations laws of the states wherein the claims arose be applied; and (b) can the forum state constitutionally evade the interest rates specified by the other states for similar claims, by ruling that each of the other states would adopt the theory of interest law adhered to by the forum state?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rule

Other Authorities

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner Sun Oil Company[1] prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Kansas entered in these proceedings March 30, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (241 Kan. 226, 734 P.2d 1190) is set forth at page A1 of the Appendix. The court's modification of such opinion, and denial of the motion for rehearing, immediately follows at page A12. The unpublished decision and judgment of the District Court of Barber County, Kansas, is set forth on page A14 of the Appendix.

1. Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix on page A31.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on March 30, 1987. A motion for rehearing was filed on April 17, 1987, and was denied, along with a modification of the opinion, on June 8, 1987. The Petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Sec. 1 of the United States Constitution provides in pertinent part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

This Court, in *Sun Oil Company v. Richard Wortman, et al.*, No. 84-1971, 106 S.Ct. 40 (October 7, 1985), vacated the judgment of the Kansas Supreme Court reflected in *Wortman v. Sun Oil Company*, 236 Kan. 266, 690 P.2d 385, for further consideration in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985). Both *Phillips* and this case were multi-state class actions by royalty owners under gas leases, in which virtually all the claims for interest arose in states other than Kansas between non-residents of Kansas, concerning gas production in states other than Kansas. The Kansas Court had ruled that all class member claimants were entitled to recover interest provided by Kansas law.

In *Phillips*, this Court ruled that the Due Process Clause and the Full Faith and Credit Clause required Kansas to apply the laws of each of the other states in which the claims arose, it appearing that the laws of Texas, Oklahoma and Louisiana, provided different, lower rates of interest on similar claims. (472 U.S. at 817).

While *Phillips* involved only the issues of liability, and the appropriate rates for interest, this *Wortman* case also involved Sun's defense that a large portion of its alleged liability, arising from Sun's July, 1976, payment of the royalty principal more than three years prior to commencement of the suit in August, 1976, was barred by the statutes of limitations of the other states. Sun argued that the Kansas borrowing statute, K.S.A. 60-516, applicable to out-of-state claims between nonresidents, required Kansas courts to apply the foreign states' limitations statutes; but if not, those limitations statutes governing claims arising in each of the other states must be applied under the Due Process Clause and the Full Faith and Credit Clause of the federal Constitution.

In its first, vacated, decision the Kansas Supreme Court held that the Kansas five year limitations statute was applicable to all claims. It did not consider the limitations laws of the other states in which virtually all claims arose and all claimants resided. (236 Kan. at 270, 690 P.2d at 390).

After remand by this Court, the Kansas Supreme Court in turn remanded back to the state district court

for further consideration. The district court's further consideration consisted of copying *verbatim* the requested findings and conclusions submitted by plaintiffs. The district court determined that each of the other states would adopt the same theory of interest developed by the Kansas courts. Sun's limitations defense was rejected without discussion of Kansas' borrowing statute, or of the federal constitutional issue raised concerning the limitations laws of the other states. (A18, A23-24).

On February 25, 1987, the Kansas Supreme Court decided *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286, on remand from this Court's *Phillips* case, supra. That decision re-affirmed the same rates of interest as to out-of-state claims, as had been applied by Kansas law, on the assumption that each of the other states would uniformly adopt the Kansas theory. This was despite the Texas Supreme Court *Stahl* decision applying a lower 6% interest rate to identical claims, and a later Texas case construing *Stahl* as not allowing interest higher than 6% based on "equitable" grounds. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. S.Ct. 1978); *Mo.-Kan.-Tex.R. Co. v. Fiberglass Insul.*, 707 S.W.2d 943 (Tex. Civ. App. RNRE, 1986). Most of the class members' claims arose in Texas. In a curious twist, the Kansas court also ruled that the differing post-judgment interest rates of each of the other states should apply to their respective portions of the Kansas judgment—although that issue was not previously before this Court and was never raised by the parties.

The Kansas Supreme Court then held that this *Wortman* case was governed, after this Court's earlier remand, by the foregoing *Shutts* decision, as to the uniform pre-judgment interest rates applicable to claims arising in all the

states. (A5-A6). The court ruled that, although "opt-out" forms allowing class members to exclude themselves from the class, constitutionally required by this Court in *Phillips*, had not been sent prior to judgment with the earlier notice to class members, it was sufficient to send opt-out forms to class members after judgment on the merits had been entered. (A8).

Finally, the Kansas court rejected Sun's contention that the Full Faith and Credit Clause and the Due Process Clause of the Constitution required the limitations statutes of the states in which the claims arose to be applied to claims arising in those states between non-residents of the forum state. Reciting the oft-repeated view that limitations laws are "remedial or procedural", the court held that this Court's *Phillips* decision did not require application of the other states' statutes of limitations. (A10-A11). It applied the Kansas five year statute, although the limitations laws of Texas, Oklahoma and Louisiana, representing over 90% of the claims, would bar those claims arising from Sun's July, 1976, payout of royalty principal.[2]

The Kansas Supreme Court denied Sun's motion for rehearing but modified its opinion by construing the Kansas borrowing statute, K.S.A. 60-516[3] to be inapplicable,

> "because it applies only where the cause of action has arisen in another state. Here, the cause of action arose

---

2. Two year statute: Vernons Texas Statutes, Art. 5526, *Hull v. Freedman*, 383 S.W.2d 236 (Tex. Civ. App. 1964). Three year statutes: 12 Okla. Stat. Ann., Sec. 95; La. Civ. Code, 3538, *O'Neal v. Union Producing Co.*, 253 F.2d 157, 158, n. 2 (5th Cir. 1946).

3. K.S.A. § 60-516 provides: "Where the cause of action has arisen in another state or country and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state except in favor of one who is a resident of this state and who has held the cause of action from the time it accrued.

in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi." (A12-A13).

The court failed to explain how over 3,000 individual claims by class members, arising separately in each of six different states, became part of a single "cause of action" by the multi-state class. This lumping of over 3,000 claims into one "cause of action" demonstrates Kansas' imposition of its own laws on claims arising elsewhere.

REASONS FOR GRANTING THE WRIT

I. The Artificial Judicial Classification of Limitations Statutes As Procedural and Remedial, in Applying the Full Faith and Credit Clause of the Constitution, and the Due Process Clause, Is Wrong. Conflict and Confusion in State and Federal Court Decisions, and Indiscriminate Forum-Shopping by Litigants, Are the Unhappy Results.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984), the present issue was left open for future decision. This Court referred to strong academic criticism of the rule that limitations statutes are considered "procedural" by the forum state, thereby entitling the forum to apply its own statute of limitations:

> ". . . There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation. See, e.g., R. Weintraub, Commentary on the Conflict of Laws Sec. 9.2B, p. 517 (2d ed. 1980); Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185, 221 (1976); Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale LJ 492, 496-497 (1919). But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation." (Footnote 10).

These critics agree to the proposition stated by the author in the Comment in 28 Yale L. J. 492, 496 (1919):

> ". . . After the enforcement of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere. Nor is there any policy pointing to a different conclusion."

Weintraub's *Commentary*, Sec. 9.2B, p. 517, also concludes:

> ". . . [I]t seems highly unreasonable for a forum that has no significant contact with the controversy to employ its own longer statute to extend the limitations period. Such conduct serves no substantial interest of the forum."

Professor Martin agrees:

> ". . . [A] state should be forbidden from entertaining a cause of action after it is dead in the state which created it." (61 Cornell L. Rev. at 221).

Both Martin and Weintraub, however, concede that a forum state may constitutionally apply its *shorter* limitations statute since it would not bar an action where the claim arose, and local policy reasons might justify such a dismissal not on the merits. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), affirmed the application of a shorter statute of limitations in the forum state, over constitutional objections. In so ruling, however, the 5-3 majority opinion recited the broad dictum that:

"Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state." (345 U.S. at 517).

The dissent by Justices Jackson, Black and Minton noted that the historical development classifying limitations statutes as procedural was inapplicable to the constitutional issues. Pointing out the ill-advised encouragement of forum-shopping by the majority rule, the dissent predicts "possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson,* (US) 16 Pet. 1, 10 L.ed. 865, ever held." (345 U.S. at 522).

The dissent then expresses the apprehension that the majority logic might go so far as to permit a forum state to apply its *longer* limitations statute, though the action was dead where it first found life:

". . . Suppose even now she [plaintiff] can get service in a state with no statute of limitations or a long one; can she thereby revive a cause of action that has expired under Alabama law? The Court's logic would so indicate. The life of her cause of action is then determined by the fortuitous circumstances that enable her to make service of process in a certain state or states." (345 U.S. at 522).

Two diametrically conflicting recent decisions illustrate the soundness of Mr. Justice Jackson's prediction. *Schreiber v. Allis Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), and *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987). Both cases were actions filed in federal district court in Mississippi, involving claims arising in other states. In both cases, the actions were transferred pursuant to 28 U.S.C. Sec. 1404(a) from Mississippi to the districts wherein the claims had arisen. In *Schreiber,*

the Tenth Circuit held that the Mississippi six year statute of limitations should be applied, since that was the forum state and Mississippi state courts would apply the six year statute to the out-of-state claim. The Section 1404 (a) transfer from Mississippi to Kansas could not change the rule. By this means, the claim arising in Kansas, and barred in Kansas by its two year limitations statute, regained life by being filed in Mississippi with its six year limitations statute, and then being transferred to Kansas.

But in *Ferens,* the Third Circuit disagreed, applying instead the limitations law of Pennsylvania where the claim arose, invoking the Due Process Clause and the Full Faith and Credit Clause.

Chief Judge Gibbons, in the 2-1 decision, essentially agreed with the strong academic criticism of *Schreiber* in more recent treatises and law review articles, i.e., E. Scoles & P. Hay, Conflict of Laws 132 (1984); Martin, Statutes of Limitation and Rationality in the Conflict of Laws, 19 Washburn L. J. 405, 421 (1980); Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L. J. 1, 56-65.

Judge Gibbons also relied on *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930), which held that a Texas state court violated the due process clause by applying its own longer limitations period than that of the foreign nation (Mexico) where the claim arose.[4] Mr. Justice Brennan's succinct statement of a deeply rooted constitutional principle governing the states, in *Allstate Insurance Co. v.*

---

4. Compare *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), discussed by Professor Martin in 61 Cornell L. Rev. at pp. 212-216. An Illinois contractual limitation shorter than Florida's limitations statute was disregarded when the insured property loss occurred in the forum state, Florida.

Hague, 449 U.S. 302, 310-11 (1981), reiterated by this Court in *Phillips,* was also relied upon by Chief Judge Gibbons:

> "[I]f a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." (819 F.2d at 427).

Professor Martin concludes flatly that *Schreiber* "is a violation of the full faith and credit clause of the Constitution. . ."; but that *Home Insurance Co. v. Dick,* "stands for the proposition that a state lacking contact with a case may not keep alive an action that is dead under the law that otherwise governs it." (19 Washburn L. J. at 415, 417).

It thus becomes self evident that a limitations statute is substantive in nature, insofar as it affects the real world. It is out-come determinative. A time limitation is far more than mere procedure, which more properly pertains to methods of commencing an action, or conducting it once commenced. Mr. Justice Jackson, in his *Wells* dissent, observed that the customary inclusion by state legislatures of limitations statutes in codes of civil procedure hardly justifies calling them "procedural" when they are plainly substantive in nature. If a claim is barred where it was created, it cannot rationally be given life by a forum state not interested in the claim itself.

Yet *Wells'* dictum continues to be relied on by lower courts, as in *Ridling v. Armstrong World,* 627 F.Supp. 1057, 1062 (S.D. Ala. 1986), which reached a result contrary to *Ferens v. Deere & Co.,* 819 F.2d 426 (3rd Cir. 1987).

Finally, the rationale of *Phillips Petroleum Company v. Shutts,* 472 U.S. 797 (1985), itself points the way to the

correct constitutional solution. The Kansas Supreme Court mechanically distinguished the limitations issue from the liability and damage issues considered in *Phillips.* (A11). But the Seventh Circuit, in *Beard v. J. I. Case,* 823 F.2d 1095 (No. 86-1484, July 6, 1987), better understood the logical implications of *Phillips* in connection with the limitations issue, although it was not necessary in *Beard* to decide that issue. The court reasoned that the rationale of *Phillips Petroleum Co. v. Shutts* "may well apply to foreign laws governing the timeliness of an action, thereby calling into question the broad language in *Wells* and *Clay.* Nevertheless, we need not decide whether *Wells* and *Clay* have survived *Shutts.*" (Footnote 9).

That metaphysical arguments distinguishing between right and remedy sound so lawyerlike, though they are "patently silly", Professor Martin ascribes to historical repetition by outdated conflicts concepts. His conclusion that statutes of limitations have significant, probably dominant, substantive purpose in granting repose, seems undeniable. We have only to look at a few areas of law wherein the limitations issue looms ever larger as time goes on—products liability, involving vast differences among state limitation laws; commercial tort and contract cases of endless variety; and multi-state class actions, such as this case itself.

Reason and common sense dictate that without a remedy, there is no right. The presence or absence of a remedy effectively allows or denies the right asserted to exist. And if a state creates a legal right, allowing courts to enforce it only during a prescribed period of time, that legal right logically terminates when the time expires.

Nothing in the Full Faith and Credit Clause of our Constitution suggests that the public Acts of one State,

limiting the time for enforcing a claim arising under the laws of that State, are not to be enforced by another state. On the face of it, the Clause literally commands the contrary.

The aberration from that supreme command stems quite simply from an unthinking repetition of the old shibboleth utilized by the lower court, that what is "remedial or procedural" does not affect the substantive right; and that a limitations statute is merely remedial or procedural.

These Due Process and Full Faith and Credit issues bearing on the limitations statutes of the various States continue to arise with great frequency. The conflict among the courts, the confusion due to overbroad and unsound dictum in *Wells*, and the constitutional need to recognize limitations statutes as substantive, are uniformly recognized by scholars in recent articles and treatises.

This constitutional issue is ripe for resolution. Having recently decided in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that the Due Process Clause and the Full Faith and Credit Clause require the forum state to apply the laws of the states where the claims arose, in a similar multi-state class action, it seems propitious and timely now to decide the present limitations issue left open by *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984).

II. The Decision Below Contlicts With Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985).

In *Phillips*, this Court observed that Texas recognizes interest liability for suspended royalties, but

> ". . . Texas has never awarded any such interest at a rate greater than 6% which corresponds with the Texas constitutional and statutory rate. Tex. Const. Art. 16, Sec. 11; Tex. Rev. Civ. Stat. Ann., Art. 5069-1.03 (Vernon 1971). See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978); . . ." (472 U.S. at 817).

Since then, Texas has re-affirmed *Stahl* in *Mo.-Kan.-Tex.R. Co. v. Fiberglass Insul.*, 707 S.W.2d 943 (Tex. Civ. App. 1986) (Error Refused, NRE, June 25, 1986). The latter case rejected as unsound several federal court decisions construing Texas law as allowing higher than 6% interest on "equitable" grounds. The 6% rate is to govern whether awarded on statutory or equitable grounds, except in a limited category of tort cases.

Yet the Kansas Supreme Court after remand by this Court in *Phillips*, found that *Stahl's* 6% rate was not applicable, since the Texas courts had not specifically considered and ruled upon the interest theory developed by the Kansas courts. (732 P.2d at 1298). It then found that Texas would apply the Kansas equity and contract theory imposing a much higher rate of interest. (732 P.2d at 1312). In short, Kansas says that a forum state may ignore the otherwise governing law of another state on an identical claim, if the forum state can conceive of reasons or theories not specifically stated and ruled upon by the other state in arriving at its rule of law. The forum state, presumably, is then free to conclude that the law of the other state is the same as that of the forum state, despite the difference in rates in identical circumstances.

The Kansas Court, in similar manner, disregarded the 6% rate established in Oklahoma and the 7% rate in Louisiana, which this Court observed were in apparent conflict with Kansas law. (472 U.S. at 817).

The claims arising in these three states composed more than 90% of the liability arising under Sun's second, 1978, payout.[5]

Kansas, the forum State, has thus failed to apply the existing laws governing interest in Texas and other States wherein the claims arose, by predicting that these States would adopt the Kansas theory of interest. Given clear statutory law and judicial precedent, the forum state should not be permitted to evade that existing, governing law by determining that the forum state has developed legal theories which the other state would follow if and when presented to its courts. Otherwise, the constitutional limitations upon states having no connection with the claims in suit can easily and regularly be evaded, and rendered for naught by theories of what the law ought to be, rather than what it is.

This Court should not permit Kansas to circumvent, so transparently, the constitutional limitations upon its power, and this Court's *Phillips'* decision defining that power.

---

5. Sun made two payouts of suspense royalties. The first was in July, 1976, more than three years before a suit was filed in August, 1976; while the second payout was in 1978. Over 90% of each payout involved claims arising in Texas, Oklahoma and Louisiana.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

GERALD SAWATZKY*
JIM H. GOERING
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

- and -

EDWYN R. SHERWOOD
Sun Exploration and Production
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608

Attorneys for Petitioner

---

*Counsel of Record

APPENDIX

[Filed March 30, 1987]

No. 59,804

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Appellees,

v.

SUN OIL COMPANY,
Appellant.

SYLLABUS BY THE COURT

1.

In a multi-state class action suit for interest on suspended gas royalties, it is held prejudgment interest is appropriate and should be calculated for all members of the class at the interest rate Sun Oil Company agreed to pay its purchasers if its rate increase was not approved by the Federal Energy Regulatory Commission.

2.

In a multi-state class action suit for interest on suspended royalties, post-judgment interest shall be calculated at the statutory rate for each state where the royalties are produced.

3.

In order for a court of this state to exercise jurisdiction over a nonresident class action plaintiff, it must meet minimal due process requirements—among other

things, that a nonresident plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "exclusion request" form to the court.

4.

While ordinarily the costs of sending notice must be borne by the plaintiff class, under the circumstances of this case, the expense of sending additional notice was properly placed upon the defendant.

5.

Generally, limitation statutes are considered as being remedial or procedural in their application and do not affect the substantive rights of the litigants.

Appeal from Barber district court, CLARENCE E. RENNER, judge. Opinion filed March 30, 1987. Affirmed in part and reversed in part.

Gerald Sawaczky, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Jim H. Goering,* of the same firm, was with him on the briefs for appellant.

W. Luke Chapin, of Chapin & Penny, of Medicine Lodge, argued the cause, and *Ed Moore,* of Ginder & Moore, of Cherokee, Oklahoma, was with him on the brief for appellees.

The opinion of the court was delivered by

HERD, J.: This is a class action filed in August of 1979 on behalf of owners of mineral leaseholds seeking to recover suspended gas royalties from Sun Oil Company. This court affirmed the district court's judgment for the plaintiff class in *Wortman v. Sun Oil Co.,* 236 Kan. 266, 690 P.2d 385 (1984). The United States Supreme Court subsequently vacated and remanded this case in light of *Phillips Petroleum Company v. Shutts,* 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2695 (1985) (*Phillips*).

While the facts in this case were set forth in some detail in our previous opinion, they will be summarized here for reference purposes.

During the 1960's and 1970's, Sun Oil Company applied to the Federal Power Commission (FPC) for gas price rate increases. While waiting for approval of such increases, Sun charged its purchasers the increased rates, but withheld the increased gas royalties from the owners of the mineral leaseholds.

In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases not ultimately approved together with interest at rates established by the Federal Energy Regulatory Commission (FERC) thereon. Sun then informed its royalty owners that payment of the increased price would be suspended until final approval of the rate increases.

In July of 1976, pursuant to FPC opinions 699 and 699H, Sun paid $1,167,000 in suspended royalties to owners of oil and gas leaseholds in six states: Texas, Oklahoma, Louisiana, New Mexico, Mississippi, and Kansas. This payment was a result of price increases collected by Sun between July 1974 and April 1976.

In April of 1978, pursuant to FPC opinions 770 and 770A, Sun paid suspended royalties in the amount of $2,676,000 to royalty owners with property in the six states listed. This payment resulted from price increases collected by Sun between December 1976 and April 1978.

This suit was filed on August 30, 1979, to recover prejudgment interest on the suspended gas royalties and was subsequently certified as a class action. Notice of the action was sent to 3,159 class members. Of these, 105 members "opted out" of the class, although none of the members were supplied with a request for exclusion ("opt out") form.

The district court determined prejudgment interest was due from Sun to the royalty owners and applied an interest rate derived from Sun's corporate undertaking with the FPC. (Sun had agreed to an interest rate to be paid on accumulated amounts of unapproved price increases refunded to gas purchasers.) The district court also awarded post-judgment interest. This court affirmed the district court's judgment in *Wortman v. Sun Oil Co.*, 236 Kan. 266, as to prejudgment interest.

The United States Supreme Court vacated and remanded this case in light of *Phillips*, holding that application of Kansas contract and equity law to class actions involving gas leases predominantly in other states was sufficiently arbitrary and unfair as to exceed constitutional limits.

On remand, the district judge concluded as follows:

"I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I *come to the same result concerning FERC interest rates to be applied as before.* All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used.

"The interest rates to be applied herein are the FERC interest rates according to 18 CFR 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime rates averaged and compounded quarterly, as set forth above until date of judgment. After date of judgment, the Kansas judgment rate of 15% per annum simple interest applies." (Emphasis added.)

The district court also ruled that the Kansas five-year statute of limitations for actions on written instruments was applicable to the claims of both residents and nonresidents. Finally, the district court determined that "opt out" forms should be mailed to class members at the expense of the defendant within 15 days from the filing of the court's decision. Sun appeals from the district court's rulings.

The first issue on appeal is whether the district court improperly applied a prejudgment interest rate derived from Sun's corporate undertaking with the FPC. Sun argues that under *Phillips*, the statutory interest rate of each state in which gas leases are located must be applied.

This issue was recently addressed and resolved in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, ... P.2d ..... (1987) (*Shutts*). In *Shutts*, this court reviewed the law of six jurisdictions containing 97% of Phillips' nationwide leases (Texas, Oklahoma, New Mexico, Wyoming, Louisiana, and Kansas). The court concluded:

"Based upon the law of the five enumerated jurisdictions as above reviewed, and upon all of the facts, conditions, and circumstances presented by this case, we find all jurisdictions would apply equitable principles of unjust enrichment to hold Phillips liable

for interest on the royalties held in suspense by Phillips as a stakeholder. Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R. § 154.102 (1986) to the time of judgment herein. *These funds held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations as heretofore set forth in this opinion.*" (Emphasis added.) 240 Kan. at .....

Shutts is controlling here and requires us to find the district court applied the proper prejudgment interest rate to the suspended royalties.

Also, pursuant to *Shutts*, we hold that the applicable interest after the date of the judgment, July 14, 1986, shall be the statutory rate for each state where the gas royalty is produced.

In Kansas, K.S.A. 1986 Supp. 16-204(c) sets the rate for post-judgment interest. The statutory interest rates on judgments in all states involved in this action, other than Kansas, are: Texas—18% (Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 [Vernon 1987]); Oklahoma 15% (Okla. Stat. tit. 12 § 727 [1985]); Louisiana—7% (La. Civ. Code Ann. art. 2924 [West 1987 Supp.]); New Mexico—15% (N.M. Stat. Ann. 56-8-4 [1986]); Mississippi—8% (Miss. Code Ann. § 75-17-7 [1986 Supp.]).

The appellant next alleges the district court erred in failing to require that class members receive exclusion request forms prior to entry of judgment and in ordering the appellant to pay the costs of notice.

With respect to this issue, the district court held:

"Both sides are agreed that it would be desirable to mail an additional notice with an exclusion request attached in order to avoid further arguments on due process. Copy of such notice, as requested by plaintiff class, is hereto attached and is ordered mailed by defendant to all members of the class. Such mailing may be included in the next regular monthly royalty payment disbursed by the defendants, but in no event not later than 15 days from the filing of this order. If there are members of the class not presently receiving royalty payments, on a monthly basis, or if there be members of the class who are no longer receiving royalty payments, then such notice shall be mailed by defendants within 15 days from the filing of this memorandum order."

In order for the district court to properly assert personal jurisdiction over class members whose residences and leases are not in the State of Kansas, minimal due process requirements must be satisfied. These requirements were recently set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811-12:

> "If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citations omitted.] The notice should de-

scribe the action and the plaintiffs' rights in it. *Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.* Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." (Emphasis added.)

Since opt out forms were never sent to class members with the notice in this case, the district court properly determined such forms must be sent in order to meet minimal due process requirements. The appellant argues, however, that the court erred in not requiring that opt out forms be sent prior to entry of judgment and at the expense of plaintiffs rather than defendants.

Notice to class members must be sent long before the merits of the case are adjudicated. 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1788 (1986). Here, while notice was sent to class members when the class was certified, it did not contain an opt out form.

Appellant cites no authority for its contention that the district court erred by not requiring opt out forms be sent prior to entry of judgment. Here, the district court had previously ruled in favor of the class and this court affirmed. While the case was ultimately remanded to the district court, members of the class were aware judgment had previously been entered for the class and the primary remaining question was what interest rate would be applied. Under such circumstances, it was proper for the district court to require that opt out forms be sent within 15 days of entry of judgment.

This leaves the issue of whether the responsibility for sending additional notice and opt out forms was properly placed with the appellant. The district court ruled that Sun was responsible for mailing notice with the exclusion request form attached to all members of the plaintiff class. The court further held that such mailing could be included in the next regular monthly royalty payment disbursed by the defendant, but in no event later than 15 days from the filing of the order.

The case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974), is relevant to our analysis of this issue. In *Eisen*, a federal district court held a preliminary hearing to determine how to allocate the costs of notice to the class. At the hearing, it was determined that the plaintiff class was likely to prevail on its claim and the defendants were thus ordered to pay 90% of the costs of the action.

In reversing the district court, the Supreme Court ruled that a preliminary procedure, such as that utilized by the district court in *Eisen*, is improper as it "may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials." 417 U.S. at 178. The court further ruled that a plaintiff must bear the initial notice costs as part of the "ordinary burden of financing his own suit." 417 U.S. at 179.

Since *Eisen*, lower courts have consistently held that notice costs must be borne by the plaintiff class. 7B Wright, Miller & Kane, Federal Practice and Procedure § 1788, p. 233. However, the Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978), left the possibility open

that in some cases, the cost of notice could be placed on the defendant. The court ruled:

> "In those cases where a district court properly decides under Rule 23(d) that a defendant rather than the representative plaintiff should perform a task necessary to send the class notice, the question that then will arise is which party should bear the expense. On one hand, it may be argued that this should be borne by the defendant because a party ordinarily must bear the expense of complying with orders properly issued by the district court; but *Eisen IV* strongly suggests that the representative plaintiff should bear this expense because it is he who seeks to maintain this suit as a class action. In this situation, the district court must exercise its discretion in deciding whether to leave the cost of complying with its order where it falls, on the defendant, or place it on the party that benefits, the representative plaintiff."

In the instant case, the merits of the case had already been determined against the defendant, Sun. Thus, we hold under the circumstances of this case the costs of financing the additional notice were properly placed upon the defendant.

Sun next contends the district court erred in applying the Kansas five-year statute of limitations to the claims of nonresident class members insofar as those claims arose out of the 1976 payment of suspense royalties. Sun argues the United States Supreme Court's holding in *Phillips* requires this court to apply the statutes of limitations of each of the states in which the claim arose.

First, it should be noted that, in *Phillips*, the Supreme Court was concerned with the *substantive* conflict between Kansas law and the laws of the states in which the gas leaseholds were located. That substantive conflict related to the interest to be applied to royalty payments—an issue already resolved by this court.

Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions § 21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations and the district court did not err in applying the Kansas five-year statute of limitations to the claims of nonresident class members.

The judgment of the district court is affirmed in part and reversed in part.

HOLMES, J., not participating.

[Filed June 8, 1987]

IN THE
SUPREME COURT OF THE STATE OF KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,	)	No. 86-59804-AS
Appellees,	)	
v.	)	
SUN OIL COMPANY,	)	
Appellant.	)	

ORDER

Sun Oil Company's motion for rehearing is denied.

The opinion filed March 30, 1987, is modified starting with the next to the last paragraph on page 232 of the advance sheet (241 Kan.) to read as follows:

Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions § 21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations.

Sun Oil further argues that K.S.A. 60-516 requires the application of the statutes of limitation of the states in which the individual royalty owners reside. That statute provides that when a cause of action has arisen in another state and by the laws of that state a cause of action cannot be maintained because of lapse of time, no action can be maintained thereon in this state. We hold K.S.A. 60-516 is inapplicable here because it applies only where the cause of action has arisen in another state. Here, the cause of action arose in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi.

We conclude the district court did not err in applying the Kansas five-year statute of limitations to the claims of nonresident class members.

The judgment of the district court is affirmed in part and reversed in part.

HOLMES, J., not participating.

BY ORDER OF THE COURT this 8th day of June 1987.

/s/ Harold S. Herd
Harold S. Herd, Justice
For the Court

[Filed July 14, 1986]

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	Case No. 79C40
	)	
SUN OIL COMPANY,	)	
	)	
Defendants.	)	

MEMORANDUM DECISION

Pursuant to Order of Remand issued by the Kansas Supreme Court on January 6, 1986, this case was briefed by the parties and was orally argued before the Court on April 29, 1986. The case had been remanded by the United States Supreme Court to the Kansas Supreme Court and then to this Court as the original Trial Court. Jurisdiction over the class as ordered by this Court has been affirmed. The remaining issues are liability of the defendant, if any, for interest on suspended royalty payments, according to laws of the various states involved and the rate of interest.

The facts of this case are as stated in the original Findings of Fact of this Court and its Memorandum Decision of December 12, 1983, pages 1-6, which are made a part hereof and will not be repeated here, plus the following supplemental finding as to interest rates from March, 1982, to date of judgement in December, 1983:

April to June '82 (March, Apr, May)	16.50%
July to September '82 (June, July, August)	15.72%
Octcher to December '82 (Sept., Oct., Nov.)	12.62%
January to March '83 (Dec. '82, Jan. & Feb. '83)	11.21%
April to June '83 (March, April, May)	10.50%
July to September '83 (June, July, August)	10.63%
October to December '83 (Sept., Oct., Nov.)	11.00%

(Above compounded quarterly. 18CFR 154.67)

CONCLUSIONS OF LAW

The Court has again carefully examined the case law and statutory law of Texas, Oklahoma, Louisiana, New Mexico and Mississippi and compared the laws of each state to the general contract interest law and equitable or moratory interest law as applied by the Kansas Court in *Shutts I* and *Shutts II;* and in this case, I find that all of those states allow a higher interest rate if there is a contract or specific agreement calling for a higher rate of interest, or in situations where equity would require a higher rate; that the equitable or moratory rate is the FERC rate, not the statutory rate; and that there is no conflict with the allowance by the Kansas Court of a contract rate or an equitable agreed rate of interest, the FERC rate, herein to royalty owners resident in other states named above.

Although plaintiffs' remedy, the recovery of interest, sounds in equity, the nature of the action is the enforcement of a written agreement which is governed in Kansas by K.S.A. 60-511 and governed in the other states named above by similar statutes concerning payment of interest

under written agreements. The Petition states (pages 2 and 3) that plaintiffs and other members of the class are entitled to recover from Sun for its use of the money on any one or more of the following theories or for the following reasons:

a. The doctrine of unjust enrichment (*Shutts I*);

b. The equitable principle of paying interest on actual use of money belonging to another (*Shutts I*, Syllabus 20);

c. Equitable principles that class members receive the same treatment as gas purchasers as to interest required by FPC (*Shutts I*, Syllabus 21 and 22);

d. Sun made an express agreement by filing corporate undertaking with FPC to pay interest on the "suspended proceeds" (*Shutts I*, Page 564).

Legal proceedings are what they are in essence and not what they may be named. (*Nelson v. Stull*, 65 Kan. 585, 68 Pac. 617.) If facts set forth in a petition entitle a party to relief, it is immaterial by what name the action is called. The Court must ascertain the true scope and nature of the action. (1 Am Jur. 2d, *Actions*, Subsection 5, Pages 545-546.) This case has an unjust enrichment feature, a basis in equity. It also has a contract feature, a basis in contract, both the oil and gas leases and the undertaking filed with FPC. Although plaintiffs' remedy may be of an equitable nature, for damages, the basis of the action arises from and grows out of written agreements. If the action is one for damages, that in and of itself does not convert it to something other than an action growing out of written contracts. (See *Baker v. Skinner*, 63 Kan. 83, 64 Pac. 981; and *Thompson v. Phillips Pipeline Co.*, 200 Kan. 669, 438 P.2d, 146.)

As a legal proposition, this case is identical to *Shutts v. Phillips Petroleum*, 222 Kan. 527, 567 P.2d 1392 (1977), cert. denied 434 U.S. 961. The only factual distinctions are the numbers involved and that FPC began making its rates nationally rather than regionally, beginning with Opinion No. 699. Insofar as royalty owners are concerned, the size and scope of the class was naturally determined by the size and scope of the FPC rate structure. Royalties under Opinion Nos. 699 and 770 were suspended, used by Sun and paid out in the same manner and at the same time to all of Sun's royalty owners involved in the six states where Sun produces natural gas.

The Court adopts the choice of law discussion set forth by the Kansas Supreme Court in *Shutts I*. I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I come to the same result concerning FERC interest rates to be applied as before. All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used.

The interest rates to be applied herein are the FERC interest rates according to 18 CFR 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime rates averaged and compounded quarterly, as set forth above until date of judgement. After date of judgement, the Kansas judgement rate of 15% per annum simple interest applies.

The only states where the liability issue of interest on FPC suspense royalties has been presented directly are

Kansas, Texas and Louisiana. Leading cases on the liability issue are as follows:

Kansas: *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied 434 U.S. 1068; and *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d .....;

Texas: *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480;

Louisiana: *Boutte v. Chevron Oil Co.*, 315 F. Supp. 524.

In this case there is one key fact: for several years Sun used money owed to royalty owners all the while knowing it never owned the money. While Sun collected 8/8ths of the increased rates, the 1/8th royalty share could never belong to Sun. That royalty share, according to eventual FERC ruling and Court approval, was either to go to royalty owners, or back to gas purchasers, with interest, or part to one and part to the other. This is true regardless of whether the increased rates were ultimately approved, disapproved or approved in part and disapproved in part. Finally the rate increases were approved, the approval conclusively determining that from the date of receipt of the increased rates the gas was worth the increased amount. Thereafter, the suspense royalties were paid to the gas royalty owners, but without interest and without any suggestion that interest was due.

There is nothing in the interest statutes of the other five states involved that would not allow the Kansas Court to grant contract rate interest or equitable or moatory interest in this case. There is nothing in the interest statutes of other states involved that would not allow the granting of FERC interest where Sun has agreed to pay FERC interest to purchasers in the event of refund of the

same money. Any alleged conflict overlooks the essential basis for the suit, seeking interest as required by contract and equity. No authority has been found demonstrating Texas or Oklahoma or any other state involved takes a narrower view of that requirement.

By accepting the rate increases on the condition of having to repay purchases with interest at FERC rates, even remotely prudent practices dictates that Sun invested the money so as to yield at least 9% which was the FERC rate during all the periods of suspension herein and until payout. Thereafter, and in August, 1979, this suit was filed, and after September, 1979, and the increase in FERC rates from 9% simple interest to the bank prime rate, compounded quarterly, Sun deliberately chose to contest paying interest rather than to pay and avoid much higher FERC rates that came later.

Many Kansas Supreme Court opinions on FPC suspense royalty interest were handed down in the period 1974 to 1978 when Sun was accumulating and using these FPC suspense royalties:

a. *Shutts I* supra;

b. *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080;

c. *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, cert. denied 98 S.CT. 1242;

d. *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634;

e. *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 cert. denied 98 S.CT. 1246;

f. *Nix v. Northern Natural Gas Producing Co. and Mobil.*, 222 Kan. 739, 567 P.2d 1332, cert. denied 98 S.CT. 1246; and

g. *Helmley v. Ashland Oil Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.

These cases clearly hold Kansas committed to FERC rates on interest to be allowed.

TEXAS

Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co., 456 F.2d 203 (1972), was a federal case dealing with Texas law. Richardson had a contract with Phillips pertaining to price to be paid by Phillips to Richardson for residue gas. The contract provided for a price "equal to the price . . . which Phillips receives . . . for gas sold to El Paso Natural Gas Company. . ." The contract further provided that in the event Federal Power Commission orders required Phillips to refund to El Paso, the price to Richardson also would be adjusted. The contract said nothing about interest, but the case definitely states at Page 201:

"Phillips made refunds to El Paso under Federal Power Commissioon orders together with interest. . ."

The Court further held:

"Phillips contends that the Texas law prohibits the award of interest on interest. . . We think Phillips misses the mark on this argument. The sum found due is technically interest. In substance, however, it is a part of the sum necessary under the holding of the District Court to place Richardson in parity with El Paso under the contract. Once that sum was determined, it became a part of the whole. Interest was due on so much of the whole as remained unpaid after January 31, 1969."

Texas is a state that has a number of cases, both state and federal, dealing with the subject of interest on FPC suspense royalties. In all of them, interest has been allowed, at the statutory interest rate of 6% excepting for the *Sid Richardson* case. They include: *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (1975); *First National Bank of Borger v. Phillips*, 513 F.2d 371 (1975); *Phillips Petroleum Co. v. Riverview*, 513 F.2d 374 (1975); *Fuller v. Phillips*, 408 F. Supp. 643 (1976); *Phillips Petroleum Co. v. Hazelwood*, 409 F. Supp. 1193 (1976); *Phillips Petroleum Co. v. Hazelwood*, 534 F.2d 61 (1976); *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360 (1977); and *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978).

The last *Stahl* case was the one where the equitable principles were used in addition to other theories, but the statutory interest rate was applied rather than FERC contract rate because no one had asked for the FERC contract rate.

OKLAHOMA LAW

There are numerous decisions in various jurisdictions fixing an equitable rate of interest different than the statutory rate, such as the Colorado Federal Court case of *Davis Cattle Co., Inc. v. Great Western Sugar Co.*, 303 F. Supp. 1165, cited by plaintiffs. Equitable or moratory interest is distinguished by every state in the nation from statutory interest. It is an underlying facet of American law and demonstrates that the law is fair and just. Sun does not argue that it would be either equitable, fair or just for it to pay only 6% interest when the going rate was twice that or more. Oklahoma follows this doctrine of unjust enrichment, *Monarch Re-*

fineries v. Union Tank Car Co., 141 P.2d 566 and *Welling v. American Roofing*, 617 P.2d 206.

Roberson Steel Co. v. Harrell, 177 F.2d 12 (Oklahoma, 10th Circuit 1949) was a case involving Oklahoma law. It was said at Page 17:

> "It is the general rule of law in Oklahoma that interest on an unliquidated account or claim is not recoverable until the amount due is fixed by judgement. *Dick v. Essary*, Oklahoma Supp. 203 P.2d 715; *Grand River Dam Authority v. Jarvis*, (10th Circuit) 124 F.2d 914; *Saulsbury Oil Co. v. Phillips Petroleum Co.*, (10th Circuit) 142 F.2d 27, certiorari denied 323 U.S. 727, 65 S.CT. 62, 89 L. Ed. 584. But compensation is a fundamental principle of damages, whether the action be in contract or tort; and one who fails to perform his contract is justly bound to make good all damages which naturally and reasonably accrue from breach. And while generally interest is not allowed upon unliquidated damages prior to the entry of judgement, the court may in the exercise of a sound discretion include interest or its equivalent as an element of damages when it is necessary in order to arrive at fair compensation. *Miller v. Robertson*, 266 U.S. 243, 45 S.CT. 73, 69 L. Ed. 265; *Concordia Insurance Co. v. School District No. 98*, 282 U.S. 545, 51 S.CT. 275, 75 L. Ed. 528."

Our Kansas Supreme Court in *Shutts I* said at Page 562:

> "Oklahoma has no decision allowing interest on 'suspense royalties.' However, several Oklahoma decisions hold that interest may be awarded on equitable grounds where necessary to arrive at a fair compensation. (*Smith v. Owens*, 397 P.2d 673 (Oklahoma 1963);
>
> and
>
> *First National Bank & T. Co. v. Exchange National Bank & T. Co.*

New Mexico undoubtedly would allow the contract - FERC rate. It does have an equitable or moratory interest case, *Chromo Mountain Range Partnership v. Gonzales*, 681 P.2d 724 (1984), which includes the allowance of moratory interest in connection with a land sale contract. (See also *Robb v. Universal Constructors, Inc.*, 665 F.2d 998, 1002.)

The statute quoted by Sun applies "in the absence of a written contract fixing a different rate. . ." In this case, we do have a written contract fixing a different rate, the undertaking filed by Sun with FERC.

MISSISSIPPI

Sun quotes no case in Mississippi that would prevent the Mississippi courts from allowing the FERC contract rate as was done in this case and in *Shutts II*. Mississippi, therefore, undoubtedly would allow the contract rate and the equitable rate allowed in this case.

Statutes of limitation questions raised by Sun at this time are a non issue - a dead issue; but this action is not barred by statutes of limitation either in Kansas or in the other states involved. In addition to the "US Rule" which makes the five year statute pertaining to royalties apply, the agreed or contract rate published by FERC also applies, and the expressed contract statute of limitations applies in all states. The Kansas Supreme Court held in this case that the five year statute, not the three year

statute as alleged by Sun, applied. The five year statute applies to written instruments. There were two written instruments, express agreements or contracts which have relation to this case. (1) the oil and gas leases; and (2) the corporate undertaking filed by Sun with FERC to pay both principal and interest on this same money. Sun continued to argue statutes of limitation in its Petition for Certiorari. The U.S. Supreme Court granted certiorari and remanded the case for reconsideration, but only "in the light of *Shutts II*". *Shutts II* says nothing whatsoever about statutes of limitation. The Kansas Supreme Court remanded to this court to reconsider also "in the light of *Shutts II*". The matter is no longer debatable. Laws pertaining to collection of interest in the other states involved on written obligations are applicable and include all interest sought by plaintiffs to be recovered from a date five years back or more from the date of filing their Petition. Interest is allowed on all amounts collected and used by Sun to a date beginning five years back of the filing of the Petition in this case.

Kansas, through *Shutts I and II*, have developed common law principles applicable to the facts of this case. I find no disregard for the laws of other states nor unfair application of Kansas law to the litigants has occurred. Sun has no constitutional right to avoid judgement in Kansas because it might have convinced a Court in another state to develop its law differently. I find that no unambiguous conflict has occurred in the rulings of *Shutts II* as compared to the established laws of the five other states involved.

Both sides are agreed that it would be desirable to mail an additional notice with an exclusion request attached in order to avoid further arguments on due process. Copy of such notice, as requested by plaintiff class, is hereto

attached and is ordered mailed by defendant to all members of the class. Such mailing may be included in the next regular monthly royalty payment disbursed by the defendants, but in no event not later than 15 days from the filing of this order. If there are members of the class not presently receiving royalty payments, on a monthly basis, or if there be members of the class who are no longer receiving royalty payments, then such notice shall be mailed by defendants within 15 days from the filing of this memorandum order.

The Court specifically finds that allowance of only 6% per annum statutory rate in times when bank prime rates rose as high as 10% to 20% was neither equitable nor proper.

Sun should pay the costs of this action, including costs of mailing the first notice on the class order by plaintiffs and the second notice as attached hereto.

Sun is hereby ordered, within 30 days of the date of this order, to account to the plaintiff class for the total amount of money owed pursuant to the interest rates herein applied; and, in the event of appeal, Sun should post bond according to statue.

Defendants' motion to decertify the class is overruled.

These findings and conclusions when filed shall act as a Journal Entry.

/s/ Clarence E. Renner
Clarence E. Renner
District Judge

Original - file

Copies - W. Luke Chapin
Ed Moore
Gerald Sawatzky
William C. Phelps

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL WORTMAN, Individually and as representatives of certain others,

Plaintiffs,

-vs- Case No. 79C40

SUN OIL COMPANY, a Delaware Corporation,

Defendant.

NOTICE OF CLASS ACTION SUIT AND JUDGEMENT

TO: All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties in 1975 through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 770 and 700A.

In 1983, you received notice that you are a member of plaintiff class in this suit against Sun for the payment of interest on suspended royalties paid by defendant in 1975 through 1979 attributable to increased gas sales prices received and withheld and used by Sun subsequent to August 23, 1974. There were about 3,000 gas royalty owners who received suspense payments in excess of $3,000,000.00.

Case was tried in the District Court of Barber County, Kansas, and interest allowed according to Federal Power

Commission interest rates; on appeal the Kansas Supreme Court affirmed; on Petition for Certiorari to the U.S. Supreme Court, it remanded to Kansas with instructions to consider further laws of other states involved, including interest rates, "in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. ..... (1985), 86 L. Ed 2d 628, 105 S.Ct. 2965."

This trial court has again considered the matter and allowed interest to you and other members of plaintiff class. your share is proportionate to the amount of suspense royalties you received.

You will be included as a member of plaintiff class and receive interest check from Sun in due time, subject to further possible appeal by Sun; provided, however, you may elect to be excluded from the class and from receiving interest check by sneding [sic] a request for exclusion form which appears at the end of this notice to the Clerk of the Court addressed as follows:

> Clerk of the District Court, Barber County Courthouse, Medicine Lodge, Kansas 67104.

This request must be mailed so as to be received on or before August 15, 1986. The court has determined that all requests for exclusion received on or before that date will be granted without further hearing. Any class member, if so desired, may appear in the case in person or through his own counsel; otherwise, plaintiffs' counsel will continue to represent him as a member of the plaintiff class.

Judgement in this action, whether for the plaintiff class or the defendant, will be binding upon all class members except those who may be excluded as above stated. Class members excluded will not be entitled to

share in the benefit of any judgement or settlement entered or concluded favorable to plaintiff class, nor will excluded class members be held bound in this action if judgement eventually is rendered for Sun.

Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding 1/3rd of the interest fund created. This means that if the interest judgement entered in your favor is affirmed on appeal and not reversed, the court may award up to 1/3rd of it to be paid to plaintiffs' attorneys to compensate them for representing your interests. If you elect to intervene with your own attorneys, your share of a favorable judgement will not be reduced, excepting for the work done by plaintiffs' attorneys up to date. If you request exclusion from the class, you will not be assessed any attorneys' fees or costs; neither will you receive any share of interest which may be allowed. If Sun should eventually win and no interest is allowed to your class, no attorneys' fees or costs can be assessed to you. if you want further information, please do not call the Judge of [sic] Clerk of the court, but call or write to one of the attorneys listed below.

If you want to remain eligible for interest check, do nothing.

If you want to exclude yourself from plaintiff class and possibility of receiving interest check, send in request below.

DATED JULY, 1986.

.....

Clarence E. Renner
District Judge

Attorneys for Plaintiffs:

W. Luke Chapin
Chapin & Penny
P. O. Box 148
Medicine Lodge, KS. 67104
(316) 886-5611

Ed Moore
Ginder & Moore
202 S. Grand
Cherokee, OK 73728
(405) 596-3383

Attorneys for Defendant:

Gerald Sawatzky
Foulston, Siefkin, Powers
& Eberhardt
700 Fourth Financial Center
Wichita, KS. 67202
(316) 267-6371

William C. Phelps
Sun Gas Company
Three North Park East
Dallas, TX 75221

..... (Cut Here) .....

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE,)
Individually and as representatives)
of certain others,)
)
Plaintiffs,)
)
-vs- Case No. 79C40)
)
SUN OIL COMPANY,)
)
Defendant.)

REQUEST FOR EXCLUSION

TO THE CLERK OF THE DISTRICT COURT OF BARBER COUNTY, KANSAS, MEDICINE LODGE, KANSAS 67401:

The undersigned respectfully requests to be excluded from the plaintiff class members in this case in accordance with the terms of this notice of class action and judgement dated July, 1986.

DATED ....., 1986.

Send to:

Clerk of the
District Court
Barber County
Courthouse
Medicine Lodge,
KS 67104

Signature: .....
Print Name: .....
Address: .....
.....
.....
Sun Owner No. .....

PETITIONER'S STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Sun Oil Company's name has been changed to Sun Exploration and Production Company, the parent company of which is Sun Company, Inc. The assets of Sun Exploration and Production Company have been transferred to Sun Energy Partners, L.P., of which Sun Exploration and Production Company is the managing general partner. The non-wholly owned subsidiaries of Sun Exploration and Production Company are Canyon Reef Carriers, Inc., East Texas Salt Water Disposal Company, and Van Salt Water Disposal Company. The non-wholly owned subsidiaries of Sun Company, Inc., are Suncor, Inc., and Sunolin Chemical Company.